Editor's note: Appealed -- dismissed, Civ.No. F90-0006 (D.Alaska May 19, 1993), aff'd No. 93-35684 (9th Cir. Oct. 11, 1994), 38 F.3d 1068

STATE OF ALASKA
GOLDEN VALLEY ELECTRIC ASSOCIATION

IBLA 88-64 Decided August 24, 1989

Appeals from a decision of the Kobuk District Office, Fairbanks, Alaska, Bureau of Land Management, declaring rights-of-way null and void in part. F-034891, F-39, and F-034779.

Affirmed.

1. Alaska: Native Allotments--Rights-of-Way: Nature of Interest Granted

> Where a Native initiates use and occupancy of certain lands in 1938, but prior to the filing of an allotment application, highway and power transmission rights-of-way are sought from and granted by BLM across such lands, subject to valid existing rights, the later filing of the allotment application vests the inchoate preference right arising from the use and occupancy, and that right relates back to the initiation of the use and occupancy, thereby taking precedence over the intervening rights-of-way applications. The subsequent legislative approval of the Native allotment in accordance with sec. 905(a) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a) (1982), precludes any inquiry into the Native's use and occupancy of the land, and the Native allotment is a valid existing right which is properly recognized by a declaration that the rights-of-way are null and void to the extent they cross lands within the allotment.

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OPINION BY ADMINISTRATIVE JUDGE HARRIS

The State of Alaska (State) and Golden Valley Electric Association (GVEA) have filed separate appeals from a decision of the Kobuk District

Office, Fairbanks, Alaska, Bureau of Land Management (BLM), dated October 2, 1987, declaring rights-of-way F-034891, F-39, and F-034779 null and void in part, as to those portions of the rights-of-way that traverse parcels B and C of Native allotment F-035085, held by the heirs of Dinah Albert. 1/ The BLM decision was based on this Board's decision in Golden Valley Electric Association (On Reconsideration), 98 IBLA 203 (1987), 2/ which modified a portion of an earlier Board decision, State of Alaska v. Albert, 90 IBLA 14 (1985), which had indicated that the Albert allotment was properly made subject to rights-of-way F-034891 and F-39.

Dinah Albert filed a number of Native allotment applications, all designated by BLM as F-035085. In 1975, BLM approved F-035085, and in a February 5, 1975, request for survey it described the approved lands as

> Parcel B and Parcel C in Section 14, T. 4 S., R. 8 W., Fairbanks Meridian, comprising that area originally surveyed as Lots 3 and 4 (two separate islands) but now one island [in the Tanana River] according to U.S.G.S. Map C-5; and Parcel D in T. 5 S., R. 6 W., Fairbanks Meridian, Section 6.

Prior to the filing of Albert's Native allotment applications in 1967 and 1968 for the lands (Parcel B and Parcel C, respectively) which are involved in the present case, 3/ the State filed applications for and received highway rights-of-way F-034891 and F-39 across lot 4, and GVEA received right-of-way F-034779 for a power transmission line across lot 3 and lot 4.

The highway rights-of-way were granted pursuant to the Federal Highway Act, 23 U.S.C. § 317 (1982), and were made subject to valid existing rights. The State secured these rights-of-way in order to construct a highway bridge on the island. The bridge is presently located on the island. The decision appealed from states that at the time rights-of-way F-39 and F-034891 were granted they passed through the 20.36-acre island, designated as Parcel C (lot 4).

BLM issued the power transmission line right-of-way to GVEA on July 11, 1966, pursuant to the Act of March 4, 1911, as amended, 43 U.S.C. § 916 (1970), repealed by section 706(a) of the Federal Land Policy and Management Act of 1976, P.L. 94-579, 90 Stat. 2739, effective October 21,

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1/ The State seeks review of the decision as it relates to highway rights-of-way F-034891 and F-39, while GVEA challenges the declaration that F-034779, a power transmission line right-of-way, is null and void in part. The two appeals were consolidated under one docket number, IBLA 88-64.

2/ This decision is the subject of judicial review in Golden Valley Electric Association v. Secretary of the Interior, No. F 87-64 (D.C. Alaska, filed Dec. 12, 1987).

3/ Although Albert filed an allotment application for an island described as "Tract #2 * * * in the center of the Tanana River" in January 1966, she thereafter relinquished that application in April 1966.

1976. The grant was made subject to valid existing rights. BLM's decision states that when right-of-way F-034779 was granted, it crossed the 6.70-acre island, designated as Parcel B (lot 3), as well as Parcel C.

Subsequent to the 1975 allotment approval, the State, in December 1982, filed a private contest complaint challenging the allotment and seeking to establish its continuing entitlements to its rights-of-way. Following an evidentiary hearing, Administrative Law Judge Michael L. Morehouse issued a decision on May 7, 1984, finding that Dinah Albert had satisfied the allotment requirements and concluding that a Native Allotment Certificate should issue, but that it should be subject to the State's rights-of-way.

Both parties appealed Judge Morehouse's decision. In State of Alaska v. Albert, supra, the Board dismissed the appeal of the State on jurisdictional grounds because the State's notice of appeal had not been timely filed. The Board also ruled that Judge Morehouse should have dismissed the contest as having been untimely filed under section 905(a)(5) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(5) (1982). Under that section, which established a time limit of 180 days from December 2, 1980, for raising objections to the approval of designated Native allotment applications, the State could have filed a private contest or a protest. The State did not file its private contest until December 1982, after the expiration of that statutory time period. The Board ruled that the State was barred from challenging the validity of Albert's allotment.

In dismissing the appeals, the Board stated:

> We note that it is unlikely that BLM will take action adverse to the State's interest in these rights-of-way. The record facts show that although Albert's use and occupancy in lot 4 commenced in 1938, at the time the State applied for and received its right-of-way grants (1965 and 1966), Albert had only an inchoate preference right to an allotment, her allotment application for lot 4 being filed in 1968. Her inchoate preference right did not become a vested right until the filing of her application. See United States v. Flynn, 53 IBLA 208, 234, 88 I.D. 373, 387 (1981). The vesting of the allotment and the subsequent approval of the allotment cannot defeat the previously granted State rights-of-way. See Golden Valley Electric Association, 85 IBLA 363, 365 (1985). If for some reason BLM were to cancel the State's right-of-way grants, the State would have the right to appeal to this Board. [Footnotes omitted].

Id. at 21-22.

BLM's October 2, 1987, adjudication of the three rights-of-way as null and void in part is based on the Board's reconsideration of the Golden Valley Electric Association case, relied on by the Board in Albert. In Golden Valley Electric Association (On Reconsideration), 98 IBLA 203 (1987), we vacated our earlier decision in which we held that a right-of-way for an electric transmission line over lands to which, at the time of issuance, an

Alaska Native had an inchoate preference right through use and occupancy, could not be defeated by a subsequent determination of entitlement to an allotment for such lands, and that the allotment was subject to the right-of-way. In reversing that holding, we affirmed the BLM decision invalidating a portion of a right-of-way for a transmission line on the ground that the right-of-way had been issued subject to the valid existing rights of a Native allotment applicant whose use and occupancy, coupled with a timely filed Native allotment application, precluded the right-of-way grant, even though the completion of the 5-years' use and occupancy and the filing of the application post-dated the grant of the right-of-way. In combination, the elements of requisite use and occupancy and a timely filed application result in the vesting of an allotment applicant's inchoate preference right. United States v. Flynn, 53 IBLA 208, 234, 88 I.D. 373, 387 (1981). Once the preference right to an allotment vests, that right relates back to the initiation of occupancy and takes precedence over competing applications filed prior to the allotment application. State of Alaska v. 13.90 Acres of Land, 625 F. Supp. 1315, 1319 (D. Alaska 1985), aff'd sub nom. Etalook v. Exxon Pipeline Co., 831 F.2d 1440 (9th Cir. 1987); Aguilar v. United States, 474 F. Supp. 840, 845 (D. Alaska 1979).

Finally, in Golden Valley Electric Association (On Reconsideration), supra at 207, we modified our decision in the Albert case by stating that Albert's inchoate preference right could defeat the State's rights-of-way if her use and occupancy of the land was open and notorious at the time of issuance of the rights-of-way.

In the decision now before us, BLM found that Albert had used her allotment continuously from 1938 to 1967, and that her use and occupancy was open and notorious at the time the three rights-of-way were issued.

The State and GVEA contend that Albert's use and occupancy was not open and notorious and therefore insufficient to provide notice of her claim, and that her rights so obtained were rendered invalid by periods of nonuse. Appellants contend that the allotment should be made subject to their rights-of-way. In the alternative, GVEA requests that the matter be remanded for a hearing to determine whether Albert's use and occupancy was sufficiently open and notorious to defeat its right-of-way.

BLM contends that it has the authority and responsibility to declare a right-of-way invalid where it determines that a Native allotment is the superior interest. That superior interest, BLM argues, vested upon the filing of Albert's applications for Parcels B and C and related back to the commencement of her use and occupancy of the land in 1938. BLM con-tends that the allotment cannot be made subject to the rights-of-way because ANILCA legislative approval of the allotment had the effect of removing from BLM the administrative jurisdiction to adjudicate conflicting claims to the land. Both BLM and Albert argue that the doctrine of administrative finality bars readjudication of Albert's qualifying use and occupancy.

BLM asserts that the issue before the Board is whether applicable law requires that the three rights-of-way be declared null and void in part, and

not whether Albert's use and occupancy served to give appellants notice of her allotment.

[1] Whether Albert's use and occupancy of the land was sufficient to qualify for an allotment under the regulations in 43 CFR Part 2560 is not an issue in this case. BLM approved Albert's allotment in 1975. The Allotment Certificate did not issue at that time because of a survey backlog. However, on December 2, 1980, Congress provided in section 905 of ANILCA, 43 U.S.C. § 1634 (1982), for statutory approval of specified allotment applications subject to the right of the State and others to file protests on certain grounds within a specified period. As we observed in State of Alaska v. Albert, supra, the State and others were specifically invited to protect their interests within 180 days of the enactment of ANILCA. 43 U.S.C. § 1634(a)(5)(B) and (C) (1982). Section 905(a) of ANILCA, 43 U.S.C. § 1634(a) (1982), was intended to promote allotment finality and thereby conveyance finality. S. Rep. No. 413, 96th Cong., 2nd Sess. 237, reprinted in 1980 U.S. Code Cong. & Ad. News 5181. The intent of that section would be frustrated by allowing the State or GVEA to come forward after the statutorily imposed time limit and challenge those allotments legislatively approved by ANILCA. Section 905(a) of ANILCA was notice to the world that specified allotment applications would be approved after the passage of 180 days without protest. Appellants' attempts to contest the sufficiency of Albert's use and occupancy for purposes of approval of the allotment under the parameters of 43 CFR Part 2560 are barred by the expiration of the statutory challenge period. State of Alaska v. Albert, supra at 20. Legislative approval had the effect of removing the Department's general authority to reexamine the question of entitlement or fur-ther condition the scope of the grant. Eugene Witt, 90 IBLA 265, 270 (1986).

In their arguments related to "open and notorious" use and occupancy, appellants focus on the Board's statement in Golden Valley Electric Association (On Reconsideration), supra, that if Albert's use was open and notorious it could defeat right-of-way grants. Appellants then assert that Albert's use and occupancy was not open and notorious at the time of issuance of their rights-of-way. Appellants argue that we should make a find-ing of fact in their favor on this issue. In support of their argument, each has provided a copy of the transcript of the 1983 hearing in the State's private contest claiming that it supports their position that Albert's use and occupancy was not open and notorious at the time their rights-of-way issued. In the alternative, GVEA asserts that, at a minimum, a further hearing should be conducted into whether or not Albert's use and occupancy was open and notorious.

The question presented is whether legislative approval allows any further examination into the circumstances of Albert's use and occupancy of the land in order to determine whether reservations for the rights-of-way may be included in the allotment. We find that it does not.

Our concluding rationale in Golden Valley Electric Association (On Reconsideration), supra, was as follows:

> Golden Valley's right-of-way was issued subject to "all valid rights existing on the date of the grant" (Exh. B to Response to Request for Reconsideration at 2). These rights included Irwin's inchoate preference right to a Native allotment established by her open and notorious use and occupancy at the time of the grant. Although this right did not become vested until later when Irwin completed the required use and occupancy and filed a timely application for Native allotment, the preference right relates back to the initiation of use and occupancy and preempts conflicting applications filed after that time, although prior to filing of the Native allotment application. Thus, on reconsideration we must affirm the decision of BLM declaring the right-of-way grant null and void to the extent it purported to grant a right-of-way over land in which Irwin held an inchoate preference right which later became a vested right.

Id. at 208.

The valid existing rights analysis of the Golden Valley case on reconsideration is applicable in this case, with the exception that, unlike in Golden Valley, the allotment in this case has been legislatively approved. In the Golden Valley (On Reconsideration) case, the Board concluded that there was open and notorious use and occupancy of the land prior to the right-of-way grant and a subsequent filing of the allotment application which resulted in the vesting of the inchoate preference right that related back to initiation of occupancy. Despite our statement in that case regarding the Albert decision, we now believe that legislative approval precludes any additional inquiry of any kind into the facts of Albert's use and occupancy of the land. Under controlling case law, Albert's allotment relates back to the initiation of her occupancy of the land, which as a matter of record was 1938; therefore, only a valid existing right could survive her allotment. The rights-of-way, approved in the mid-1960's, cannot be considered valid existing rights since they did not come into existence until long after initiation of Albert's allotment. Those rights-of-way, however, each were issued subject to valid existing rights. The allotment, under the relation back doctrine, is such a right. For that reason, we are compelled to the conclusion that legislative approval of the allotment necessitated BLM's action in declaring the rights-of-way null and void to the extent they cross allotment F-035085. 4/

4/ While appellants have urged that the allotment should issue subject to the rights-of-way, they have demonstrated no authority under which BLM would be required to so limit the allotment. As we noted in Golden Valley Electric Association (On Reconsideration), supra at 207 n.1, and in State of Alaska v. Albert, supra at 19 n.7, BLM has apparently changed its policy of issuing allotments subject to rights-of-way. Under the Native Allotment Act the Secretary is afforded discretion, but not unfettered discretion, in adjudicating allotment applications. Pence v. Kleppe, 529 F. 2d 135, 140 (9th Cir. 1976). In a case such as this, the Secretary's discretion is circumscribed by the controlling case law. We note that in Degnan v. Hodel,

Even though the above discussion resolves these appeals, we will briefly address other arguments raised by appellants. The State argues that BLM was without jurisdiction to declare its rights-of-way null and void in part and that to do so was an abuse of discretion depriving the State of due process and property without just compensation. GVEA joins in the due process argument. In Golden Valley Electric Association (On Reconsideration), supra, we upheld BLM's action cancelling a right-of-way in similar circumstances. Clearly, where BLM issues a right-of-way sub-ject to valid existing rights and subsequently it is determined that such rights exist, BLM has the jurisdiction to declare the right-of-way null and void. 5/ In this case due process considerations have been satisfied. BLM's October 2, 1987, decision gave appellants notice that BLM was declaring the rights-of-way null and void in part and stated the grounds therefor. Appellants were provided the right to appeal to this Board, thereby satisfying the requirement of the right to be heard. See Santa Fe Pacific Railroad Co., 90 IBLA 200, 220 (1986).

The State alleges that cancellation of its rights-of-way is contrary to 43 U.S.C. § 1166 (1982), which provides that "[s]uits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents." As we stated in State of Alaska v. Albert, supra at 21, a right-of-way grant is not an

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fn. 4 (continued)
No. A87-252 Civil (Feb. 15, 1989), the Alaska District Court reversed Clarence Lockwood, 95 IBLA 261 (1987), where the Board had upheld the reservation of a right-of-way for a segment of the Iditarod Trail across Native allotments. The court found that once the Secretary had granted interim approval of the allotments, thereby conveying equitable title to the allotment applicants, he "was thereafter without power to diminish that title by reserving rights-of-way across the allotment lands under the [National Trails System Act]" (Order at 8).

5/ In a letter dated Aug. 23, 1988, the State alleges that the "land which is the subject of the appeal was conveyed to the State by [quitclaim deed of] the Department of Commerce in 1959," a conveyance which "would appear to deprive the Department [of the Interior] of jurisdiction over the subject matter of the appeal." The letter refers to a deed describing a section of the highway conferred as follows: "From the junction of FAP Route 61 and 62 at Fairbanks via Ester to the end of south approach to Tanana River at Nenana." The State asserts that this description implies that the right-of-way extends across the river.

Under section 21 of the Alaska Omnibus Act of June 25, 1959, 73 Stat. 141, 145, the Secretary of Commerce was required to transfer to the State "all lands or interests in lands * * * owned, held, administered by, or used by the Secretary in connection with the activities of the Bureau of Public Roads in Alaska." There is no clear indication that the island, or islands, in question in the Tanana River were owned, held, administered by, or used by the Department of Commerce, such as to have been part of the 1959 conveyance. Moreover, the State's applications for rights-of-way across those lands, filed with BLM in 1965 and 1966, are inconsistent with any claim by the State of ownership dating from 1959.

application for title and cannot be considered as passing title. There-fore, the statute has no application. See Kern River Co. v. United States, 257 U.S. 147 (1921).

Finally, the State contends that estoppel should apply to prevent challenges to its rights-of-way. The State asserts that it relied in good faith on the issuance of its rights-of-way, receiving no notice from either BLM or Albert that there would be a problem with those rights-of-way. Among other factors, a crucial misstatement in an official decision is an express precondition for invoking estoppel. Cyprus Western Coal Co., 103 IBLA 278 (1988), and cases there cited. There was no affirmative misrepresentation or concealment of facts by Departmental officials. Again, as previously discussed, the rights-of-way were issued subject to valid existing rights.

To the extent that appellants have made other arguments that have not been expressly discussed, they have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Administrative Judge

I concur:

Wm. Philip Horton
Chief Administrative Judge